Supreme Court, U.S.
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No. 97-1172

In The

Supreme Court of the United States

October Term, 1997

WINSLOW R. LIEVSAY,

Petitioner,

vs.

WESTERN FINANCIAL SAVINGS BANK, F.S.B., a Federal Savings Bank, and UNITED STATES TRUSTEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT WESTERN FINANCIAL SAVINGS BANK, F.S.B.

KENNETH D. PASSON
Counsel of Record
GALFIN & PASSON, LLP
Attorneys for Respondent
Western Financial Savings Bank, F.S.B.
18101 Von Karman Avenue
Suite 1400
Irvine, California 92612
(714) 752-2444

144671

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Western Financial Bank is Westcorp Financial and Western Financial Bank has no nonwholly owned subsidiaries.

INTRODUCTION

The Petition for Writ of Certiorari by Petitioner and Debtor, Winslow R. Lievsay, acting in pro per, is the latest maneuver in the appellate process practiced by an individual debtor who initially sought relief under Chapter 11 of the United States Bankruptcy Code on November 7, 1994. At the time of Petitioner's bankruptcy filing, he was eight (8) payments delinquent totaling approximately $24,000 in his loan from Respondent Western Financial Savings Bank ("Western Financial") secured by a first deed of trust on Debtor's personal residence. Debtor has never argued that he was not in default at the time of the bankruptcy petition.

At various times during the more than three (3) years Debtor has languished in Chapter 11, Debtor admonished Respondent that he would appeal the issues he raised "to the Supreme Court, if necessary", and now he has. Those appeals have included: (1) the denial of Debtor's Chapter 11 Plan of Reorganization by the Bankruptcy Court and Bankruptcy Appellate Panel which is the subject of this Petition for Writ of Certiorari; (2) an appeal of an Order Granting Relief From the Automatic Stay given to Western Financial pursuant to 11 U.S.C. § 362 when his original appeal was denied; (3) the appeal of an order denying a stay pending appeal; and (4) the appeal of an adversary proceeding filed by Debtor in which the Bankruptcy Court granted judgment in favor of Western Financial. In the adversary proceeding, Debtor filed an action to recover all of the post bankruptcy petition monthly mortgage payments he made to Western Financial pursuant to various orders of the Bankruptcy Court and the Ninth Circuit Court of Appeals which compelled Debtor to make his monthly mortgage payments to Western Financial and pay his property taxes during the bankruptcy and the Debtor's multiple appeals. The orders were issued as an express condition to a stay of Western Financial's enforcement of its foreclosure rights as secured creditor. The appeals were so endless that on September 18, 1997, the Ninth Circuit Court of Appeals took the unusual step of issuing the following

order against Petitioner as to the general issue which is now the subject of Debtor's Petition for Writ of Certiorari:

> No motions for reconsideration, clarification, or modification of this order shall be filed or entertained.

In light of the Petitioner's prior admonitions, and his extraordinary and perhaps vexatious efforts on his own behalf, the current Petition for Writ of Certiorari was expected. Notwithstanding the fact that all trial and appellate courts which have reviewed Petitioner's claims and arguments surrounding his Chapter 11 filing have consistently rejected his lay interpretations of substantive law and procedure in a Chapter 11 context, as discussed below, the subject matter of this Petition is also moot.

The primary asset in Debtor's bankruptcy was his personal residence subject to a first lien in favor of Western Financial in the original amount of $288,000. The loan was substantially in default at the time of his bankruptcy filing. Debtor sought to re-organize his sizable debts by "stripping" Western Financial's lien to the amount of the current fair market value of the property which he claimed was authorized by 11 U.S.C. § 1123(b)(5). The Bankruptcy Court, United States Bankruptcy Appellate Panel of the Ninth Circuit, and Ninth Circuit Court of Appeals, joined in rejecting Debtor's claims. The Petition for Writ of Certiorari followed.

THE PETITION FOR WRIT OF CERTIORARI IS MOOT

Upon exhaustion of all appeals and stays issued as to foreclosure, on August 13, 1997, Western Financial completed its non-judicial foreclosure on Debtor's real property under California law. Unlawful detainer proceedings were initiated to successfully recover possession of the premises which has now been re-sold to a third party.

The fulcrum of Debtor's reorganization was the treatment of the deeds of trust on the residential property and specifically the treatment in the bankruptcy of the secured claim of Western Financial. In view of the foreclosure and subsequent re-sale of the property by Western Financial to a third party, the centerpiece of all of Debtor's claims as to this Petition for Writ of Certiorari no longer exists. Hence, there is a classic application of the doctrine of mootness. Moreover, at the time of this writing, on February 10, 1998, a status hearing is scheduled at which time the Bankruptcy Court will determine whether this bankruptcy should be dismissed for failure to have a Plan or Reorganization approved in more than three (3) years.

When the subject matter of the appeal is no longer at issue, the Court will not decide the issues on appeal. Citing earlier authorities, in *Church of Scientology of Cal. v. United States*, 506 U.S. 9 (1992) this Court has stated that "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " Further, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed."

In a factual scenario more similar to this Petition, *In Re Mann*, 907 F.2d 923 (9th Cir. 1990), it has been said that

> Under 11 U.S.C. 363(m), an appeal of a bankruptcy court's ruling on a foreclosure action generally cannot affect the rights of a good faith purchaser of the foreclosed property, unless the debtor stays the foreclosure sale pending an appeal. See *Onouli-Kona Land Co. v. Estate of Richards* (*In re Onouli-Kona Land Co.*), 846 F.2d 1170, 1171-73 (9th Cir. 1988); *Algeran, Inc. v. Advance Ross Corp.*, 759 F.2d 1421,

> 1423-24 (9th Cir.1985). Accordingly, the debtor's failure to obtain a stay normally renders the appeal moot. *Algeran*, 759 F.2d at 1423. This is true even when the purchaser knows of the pendency of the appeal or, as in this case, is a party to the appeal.

Moreover, the Ninth Circuit rejected Debtor's contentions on procedural grounds only finding that the Bankruptcy Court order was interlocutory in nature and not appealable or subject to review at that time. The court never addressed the substantive grounds raised by Petitioner. Accordingly, Petitioner has not completed the pre-requisite substantive appeal and review of his claims by lower appellate panels to support his contention that a split of authority exists which justifies the Writ. Rather, the Writ as to the legitimacy of his Chapter 11 Disclosure Statement remains interlocutory and not appealable at this time as a matter of law.

CONCLUSION

Of the important issues which require this Court's attention and limited resources, and with all due historical perspective, the subject matter of this lay Petition does not rise to a satisfactory level of import. Moreover, the Petition is clearly moot. The Petition should be denied.

Respectfully submitted,

KENNETH D. PASSON
Counsel of Record
GALFIN & PASSON, LLP
Attorneys for Respondent
Western Financial Savings Bank, F.S.B.
18101 Von Karman Avenue
Suite 1400
Irvine, California 92612
(714) 752-2444